

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

ANDREW CAINION,

Petitioner,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

**CASE No. 17-3-0003**  
**(Cainion II)**

**ORDER ON MOTION TO DISMISS**

**I. INTRODUCTION**

This matter comes before the Board pursuant to the City of Bainbridge Island's Motion to Dismiss Petition for Review.<sup>1</sup> The Board had before it the following submittals from the parties:

- Petition for Review, May 1, 2017 (PFR);
- City of Bainbridge Island's Motion to Dismiss Petition for Review, June 20, 2017 (City's MTD);
- Petitioner's Response to Motion to Dismiss, June 30, 2017 (Response to MTD);
- City of Bainbridge Island's Reply on Motion to Dismiss, July 10, 2017 (City's Reply).

*(Legal issues are attached as Appendix A.)*

**II. LEGAL STANDARD**

The Growth Management Act (GMA) provides for dismissal of frivolous petitions.<sup>2</sup> Under RCW 36.70A.270(7), the Board is generally to follow the rules and procedures of the

<sup>1</sup> Filed June 20, 2017.

<sup>2</sup> RCW 36.70A.290(3).

1 Administrative Procedures Act and to establish rules to practice before it. The Board's  
2 Rules of Practice and Procedure establish the framework for addressing dispositive motions  
3 on a limited record, including acknowledging that a motion for summary judgment will rarely  
4 be entertained.<sup>3</sup>

### 6 III. ANALYSIS

#### 7 **Background**

8 Mr. Cainion owns a 0.89-acre parcel of property within the city of Bainbridge Island  
9 adjacent to Island Center, an area designated Neighborhood Service Center (NSC).<sup>4</sup> Mr.  
10 Cainion's parcel was designated Open Space Residential – 0.4 in 2004.<sup>5</sup> In February 2010,  
11 Mr. Cainion filed an application to amend the land use designation of his parcel to NSC and  
12 filed a PFR with the Growth Management Hearings Board (GMHB) after the City denied his  
13 proposed amendment. In 2010, Mr. Cainion argued that the designation adopted in 2004  
14 was appealable because the Comprehensive plan called for a "Special Planning Areas  
15 Process"<sup>6</sup> for Neighborhood Centers which had not been completed and thus extended the  
16 appeal period.<sup>7</sup> Finding that the City's Comprehensive Plan did not give a clear mandate  
17 and/or definite timeline to complete studies related to NSC and thus did not establish a duty  
18 upon which GMA violations could be founded, the Board concluded that Mr. Cainion's 2010  
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24 <sup>3</sup> WAC 242-03-555(1).

25 <sup>4</sup> PFR at 3; MTD at 1.

26 <sup>5</sup> *Cainion v. City of Bainbridge Island*, GMHB No. 10-3-0013 (Order on MTD, January 7 2011) at 3-4.

27 <sup>6</sup> Exhibit A to City's Reply: 2004 Comprehensive Plan Land Use Elements. From 2004 through 2016, Policy  
28 LU 1.9 read:

29 A Special planning Area is an area which reflects uses and/or conditions which are unique to that  
30 area and would benefit from a local and/or neighborhood planning process. The Special Planning  
31 area process would address such issues as current use, future mix and location of uses and  
32 densities, transportation, public facilities, services and amenities, and protection of natural systems.  
The Special Planning Area process would include property owners and neighborhood participation,  
and may include mediation as a means to resolve significant issues, if directed by the city council.  
The end result of a special planning process would be a "neighborhood," "subarea" or site-specific  
plan which will require an amendment to the comprehensive Plan, unless no changes to the Plan's  
policies are proposed.

Emphasis added.

<sup>7</sup> *Cainion v. City of Bainbridge Island*, GMHB No. 10-3-0013 (Order on MTD, January 7 2011) at 3-4..

petition was an untimely collateral challenge to the 2004 zoning and dismissed the case upon motion by the City.<sup>8</sup>

In 2015, Mr. Cainion again filed an application to rezone his parcel to NSC, this time without the use of a Special Area Planning Process, and to amend the Comprehensive Plan to allow the same.<sup>9</sup> The City Council did not approve either amendment, but amended its Land Use Implementation Section to make adoption of a “multi-year work program to undertake the subarea planning process” for designated centers, including Island Center, a “high priority,” the new product of which will be a Subarea Plan to be adopted into the Comprehensive Plan at a future, unspecified date.<sup>10</sup>

### ***Discussion***

Mr. Cainion’s challenge rests on the assertion that the City was required to adopt his amendments. The Board has long held that it does not have the authority to review denials of proposed amendments, but exceptions to this rule do exist. Namely, the Board may review the denial of a comprehensive plan amendment if such a denial causes the jurisdiction to fail to comply with an explicit requirement of the GMA or the City’s own Comprehensive Plan.<sup>11</sup> Thus, the primary question for the Board is whether the denial of Cainion’s proposed amendments fails to fulfill an explicit duty under the GMA or the City’s Comprehensive Plan.

The City asserts that Mr. Cainion’s challenge must be dismissed because nothing in its plan policies or the GMA mandates that Mr. Cainion’s rezone request be approved.<sup>12</sup> Mr. Cainion responds that the City was required to take action with respect to his property because the currently effective comprehensive plan lists subarea planning for Island Center as a “high priority” action.”<sup>13</sup> The amended policy makes adoption of a multi-year work

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<sup>8</sup> *Cainion v. City of Bainbridge Island*, GMHB No. 10-3-0013 (Order on MTD, January 7 2011) at 3-4.

<sup>9</sup> PFR at 6; Exhibit 1025 or 1026, attached to PFR and excerpts attached as Exhibit C to City’s Reply.

<sup>10</sup> City’s Reply at 2 and Attachment B to same.

<sup>11</sup> See e.g., *Orchard Reach v. City of Fircrest*, GMHB No. 06-3-0019 (Order of Dismissal, July 6, 2006) at 5. *City of Tacoma v. Pierce County*, CPSGMHB No.99-3-0023c (Order of Dismissal, March 10, 2000); *Port of Seattle v. Des Moines*, CPSGMHB No. 97-3-0014, (Final Decision and Order, August 13, 1997).

<sup>12</sup> City’s MTD at 1; Ordinance 2017-1, Section 2, at 3.

<sup>13</sup> 2016 Comprehensive Plan at LU-30: LU Action #5. Reply to MTD at 2.

1 program to undertake the subarea planning for Island Center, among other subareas, a high  
2 priority, but **the Board finds** that it cannot be read to require the City to approve  
3 redesignation of Mr. Cainion's property either with or without completion of the subarea  
4 plan.

5 Further, Mr. Cainion asserts that the only action that comports with the GMA is  
6 approval of his rezone request because it is consistent with GMA Goals and the City's  
7 comprehensive plan policies.<sup>14</sup> As the Washington Supreme Court stated in *Stafne v.*  
8 *Snohomish County*:<sup>15</sup>

10 County and city councils have legislative discretion in deciding to amend or not  
11 amend their comprehensive plans. Absent a duty to adopt a comprehensive  
12 plan amendment pursuant to the GMA or other law, neither the board nor a  
13 court can grant relief (that is, order a legislative discretionary act).

14 In essence, Mr. Cainion posits that the City is required to approve any request that is  
15 *not inconsistent* with GMA goals and comprehensive plan policies because to do otherwise  
16 thwarts those goals and policies. Such a conclusion simply cannot be reconciled with the  
17 discretion the GMA grants local legislative bodies.<sup>16</sup> The GMA requires that local actions be  
18 *guided by* GMA goals,<sup>17</sup> *consistent* with GMA mandates,<sup>18</sup> and *consistent* with  
19 comprehensive plan policies.<sup>19</sup> Nowhere does the GMA require a jurisdiction to take an  
20 action merely because it is *not inconsistent* with the GMA or its comprehensive plan.

22 Also of concern is the relief requested by Mr. Cainion, namely that the Board remand  
23 Ordinance 2017-01 to the City "with instructions to approve petitioner's request for a  
24 comprehensive plan and map amendment."<sup>20</sup> It is beyond the statutory authority of the  
25 Board to prescribe the manner in which a legislative body shall achieve compliance.<sup>21</sup>

28 <sup>14</sup> Response to MTD at 2-6.

29 <sup>15</sup> 174 Wn.2d 24, 38, 271 P.2d 868 (2012).

30 <sup>16</sup> See RCW 36.70A.3201.

31 <sup>17</sup> *Whatcom County v. Hirst*, 186 Wn.2d 648 689381 P.3d 1(2016); *Quadrant Corp. v. Cent. Puget Sound*  
32 *Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005); *KAPO v. Kitsap County, et al.*, GMHB  
No. 16-3-0016 (Final Decision and Order, April 24, 2017) at 8.

<sup>18</sup> *Id.*

<sup>19</sup> RCW 36.70A.130.

<sup>20</sup> PFR at 16.

<sup>21</sup> RCW 36.70A.300(3)(b).

1 **Legal Issues 1-3**

- 2 • Legal Issue 1 asserts that the City violated the requirement of RCW 36.70A.020  
3 that its actions be *guided* by planning goal 1, which requires it to “encourage  
4 development in urban areas where adequate public facilities and or can be  
5 provided in an efficient manner.”  
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7 • Legal Issue 2 asserts that the City violated the requirement of RCW 36.70A.020  
8 that its actions be *guided* by planning goal 5, which requires encouragement of  
9 economic development.  
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11 • Legal Issue 3 asserts that the City violated the requirement of RCW 36.70A.020  
12 that its actions be *guided* by planning goal 6, which requires protection of private  
13 property rights of land owners from arbitrary and discriminatory actions.

14 Citing the Washington Supreme Court and prior Board decisions,<sup>22</sup> the City argues  
15 that the thirteen planning goals in RCW 36.70A.020 are set forth exclusively to guide the  
16 development and adoption of comprehensive plans and development regulations and do not  
17 impose mandates that are not enumerated elsewhere in the GMA.<sup>23</sup> The Board agrees.  
18 Mr. Cainion’s issue statements do not assert violation of any substantive requirements of  
19 the GMA.  
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21 **The Board finds** that RCW 36.70A.020 does not impose upon the City of Bainbridge  
22 Island any duty to adopt Mr. Cainion’s proposed amendments.  
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24 **Legal Issue 4**

25 Legal Issue 4 repeats Issue 2 and adds the assertion that the City’s failure to rezone  
26 Mr. Cainion’s property somehow thwarts the RCW 36.70A.110 mandate that urban growth  
27 be accommodated where urban services can be provided. Issue 4 also asserts that the  
28 City’s failure to rezone Mr. Cainion’s property violates RCW 36.70A.130 because it is  
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32 <sup>22</sup> *Whatcom County v. Hirst*, 186 Wn.2d 648, 689, 381 P.3d 1 (2016); *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005); *Kitsap Alliance of Property Owners (KAPO) v. Kitsap County, et al.*, GMHB No. 16-3-0016 (Final Decision and Order, April 24, 2017) at 8.

<sup>23</sup> City’s MTD at 4-6.

1 inconsistent with the GMA purpose of concentrating development in contiguous areas, so  
2 that public facilities may be provided more efficiently and with less environmental harm.

3 The City argues that it has discretion over the location and configuration of urban  
4 growth within its city limits and has no duty to rezone Petitioner's property. In response, Mr.  
5 Cainion offered no explanation as to how rezone of his property is necessary for the City to  
6 provide urban services to accommodate growth and/or to concentrate growth in contiguous  
7 areas. As above, Mr. Cainion's assertion rests on the theory, rejected by the Washington  
8 Supreme Court in *Stafne*, that GMA mandates adoption of any amendment that is not  
9 inconsistent with the GMA.  
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11 **The Board finds** that RCW 36.70A.110 and .130 do not impose upon the City of  
12 Bainbridge Island any GMA duty to adopt Mr. Cainion's proposed amendments.  
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#### 14 **Legal Issues 5-7**

15 At the prehearing conference, the Board noted and the parties agreed that Issues 5-7  
16 raise constitutional issues not within the subject matter jurisdiction of the GMHB. Because  
17 the GMHB has no authority to rule on constitutional issues, the Board is obligated to dismiss  
18 these claims.<sup>24</sup>  
19

20 **The Board finds** that the constitutional issues raised are not within the Board's  
21 subject matter jurisdiction.  
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#### 23 **Conclusion**

24 Based on the above, **the Board finds and concludes** that the GMA does not  
25 impose a duty upon the City of Bainbridge Island to adopt Mr. Cainion's proposed  
26 amendments and that the constitutional issues raised are not within the Board's  
27 jurisdiction.  
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32 <sup>24</sup> The Board must dismiss an issue when the Board determines it lacks jurisdiction, since the Board has no power to adjudicate that particular case. See *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks jurisdiction over a proceeding, it "may do nothing other than enter an order of dismissal"]. See also *Griffith v. City of Bellevue*, 130 Wn.2d 189, 196 (1996).

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#### IV. ORDER

Upon review of the GMA, the Board's Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of the Board and having deliberated on the matter, the Board enters the following Order:

1. The City of Bainbridge Island's Motion to Dismiss Petition for Review is **granted**.
2. The Petition for Review in *Andrew Cainion v. City of Bainbridge Island (Cainion II)* is **dismissed**.
3. GMHB Case No. 17-3-0003 is **closed**.

DATED this 4th day of August, 2017.

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Cheryl Pflug, Board Member

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Deb Eddy, Board Member

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Nina Carter, Board Member

## APPENDIX A: LEGAL ISSUES

1. Does the City's Ordinance violate RCW 36.70A.020(1), requiring encouragement of development in urban areas?<sup>25</sup>
2. Does the City's Ordinance violate RCW 36.70A.020(5), requiring encouragement of economic development?<sup>26</sup>
3. Does the City's Ordinance violate RCW 36.70A.020(6), the requirement to protect private property rights of land owners from arbitrary and discriminatory actions?<sup>27</sup>
4. Does the City's Ordinance violate RCW 36.70A.020, RCW 36.70A.110, RCW 36.70A.130 goals and requirements that actions: (1) must be consistent with the goals and requirements of the GMA; (2) must be guided by GMA Planning Goal 6; (3) cannot thwart the GMA mandate to accommodate urban growth where urban services can be provided; (4) cannot thwart the primary goal of the GMA to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner; and (5) must be consistent with one of the primary purposes of the GMA which is to concentrate development in contiguous areas, so that public facilities may be provided more efficiently and with less environmental harm?<sup>28</sup>
5. The Ordinance is in error because it violates Petitioners' constitutionally protected property rights set out in the Washington State and Federal Constitution, Article 1, Section 3 (Washington Constitution) and the Fifth Amendment (U.S. Constitution).<sup>29</sup>
6. The Ordinance violates the equal protection and due process constitutional rights of Petitioner.<sup>30</sup>
7. The Ordinance violates legal standards requiring the City to implement its Comprehensive Land Use Plan fairly and without discrimination and not act in an arbitrary fashion.<sup>31</sup>

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<sup>25</sup> Prehearing Order (May 16, 2017) at 2-3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Order on Motion to Amend PFR (June 1, 2017) at 4.

<sup>29</sup> Prehearing Order (May 16, 2017) at 2-3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*